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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. [redacted] 77

HANNAH M. SMITH, Administratrix of Estate of Owen P. Smith, Deceased,

Petitioner,

versus

MAGIC CITY KENNEL CLUB, INC., and JOHN J. SHAUGHNESSY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

E. HOWARD M'CALEB,
Counsel for Petitioner.

MONTGOMERY-ANDREE PRINTING CO. INC., 430-432 CHARTRES, N. O.

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versus

MAGIC CITY KENNEL CLUB, INC., and JOHN J. SHAUGHNESSY.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of Hannah M. Smith, Administratrix of the Estate of Owen P. Smith, deceased, respectfully shows to this Honorable Court:

—A—

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an equity suit for infringement of petitioner's five patents relating to devices used in dog racing amusement (R. pp. 2 to 13). As the reasons for allowing

the writ of certiorari are concerned with infringement of Patent No. 1,379,224, claims 1 and 2 (R. pp. 11, 12, to 165), and Patent No. 1,507,140, Claims 1, 2 (R. pp. 11, 108, 109), we omit reference to those parties defendant other than respondents who were dismissed (R. pp. 92, 108), to two patents withdrawn (R. p. 74) and to Patent No. 1,630,812 (R. pp. 6, 11) determined adversely to petitioner (R. pp. 106 to 109).

Temporary injunction was granted but withheld upon respondents furnishing $20,000.00 bond for anticipated damages in case it should be finally decided that respondents have infringed any one of the claims (R. pp. 40, 41) which bond was filed (R. p. 41). Respondents answered, denying validity of the Patents and their infringement of the claims (R. pp. 47 to 70). Special Master was appointed to hear and determine the issues and report thereon (R. p. 71). At the hearing before the Master, the patents were assumed valid, treated as such by the parties and the Master (R. p. 78), the real issue being that of infringement of the claims (R. p. 78), and after taking testimony (R. pp. 109 to 155) the Master filed his report finding infringement (R. pp. 73 to 93). Respondents excepted to the Master's Report solely on the issue of infringement (R. pp. 94 to 105). The exceptions were overruled and an appropriate decree approving the Master's Report and adjudging infringement duly entered (R. pp. 106, 107, 108, 93), from which decree respondents appealed to the Circuit Court of Appeals for the Eighth Circuit (subsequently transferred to the Tenth Circuit under Act Cong. Feb-

(a) Summary as to Patent No. 1,379,224, Claims 1 and 2.

and that the arm is hinged to the conveyor car and supported at its outer end by a wheel 26 rotatably mounted (R. p. 164, lines 9 to 17). The essential facts are not in dispute; comparison of the two claims with respondent's device (R. pp. 177, 465, 467, 32, 33, 35, 36, 79, 80, 91, 110, 111, 112, 115, 116) shows an appropriation of the claims excepting respondent's lure carrying arm is pivoted to the car or rigidly supported in lieu of the hinge and wheel support described and claimed.

(b) Summary as to Patent No. 1,507,440, Claim No. 1.—In a housing for covering tracks and cars having laterally extending arm operated on said track, the combination of (a) posts set in the ground at the sides of said track, (b) timbers attached to said posts to form a frame, (c) boards attached to said timbers and posts to form a continuous enclosure above said track, and having a continuous opening in one side of said housing adapted to permit extension of the laterally extending arm therethrough; (d) and truss rods attached to the closed side of the housing adapted to support the side of said housing above the said continuous opening. (R. p. 169, lines 97 to 110). In his specifications, the patentee says, that the invention is not restricted to the exact details of construction (R. p. 169, lines 24 to 34); and Claims 2 and 3 provided adjustable stay rods and adjustable screw threaded stay rods (R. pp. 169, 170) instead of the truss rods of Claim No. 1. The essential facts are not in dispute; comparison of the Claim No. 1 with respondent's housing device (R. pp. 177, 179, 33, 35, 37, 83, 84, 110, 112, 117), shows a literal translation of Claim No. 1.

Short statement of matter involved.—As to Patent No. 1, 1,379,224, Claims 1 and 2, the matter involved is whether or not respondents' rigid support of the horizontal lure carrying arm is the equivalent of the movable support of that arm as described and claimed in the Patent.

And further, the question is (1) whether this patent is of primary character, or if not whether it has substantially advanced the art, entitling the patentee (petitioner), in either case, to a range of equivalents commensurate with its scope; (2) whether these claims are restricted to a movable (hinge and wheel) support of the horizontal lure carrying arm; (3) whether infringement is avoided by the (respondents') substitution of a rigid for the movable support of said arm; (4) whether the essence of the invention is the horizontal-lure-carrying arm projecting through a continuous longitudinal opening of the casing; (5) whether infringement is avoided by Respondents' substitution of a rigid for said movable support of the arm and pertaining to environment of the inventive step; (6) whether the patentee is deprived of equivalents of such accessorial element of support of the arm described and claimed in his preferred form, there being no limitation imposed by the prior art and no disclaimer of equivalents; (7) whether Respondents have infringed the claims.

As to Patent No. 1,507,440 and the claims thereof, particularly Claim No. 1, the matter involved and the question is whether respondents' copy of the Claim avoids infringement by ascribing to it or its elements a nomenclature different from the patentee's glossary in structural engineering with no difference in function, operation and result.

As to the discharge of the stipulated damage bond, the matter involved and the question is whether or not, on a decree of infringement of any one of the claims stipulated, the bond is void on the Court's own suggestion or motion, admittedly without evidence to support it, that such bond is a subterfuge for the payment of alleged illegal profits to be derived by respondents from their use of the infringing device.

—B—

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) As to Patent No. 1,379,224, Claims 1 and 2. The decision of the Tenth Circuit Court of Appeals denying infringement is in conflict with the decison of the Fifth Circuit Court of Appeals on the same matter *(Rule 38, Sec. 5 [b])*. See *American Electric Rabbit Racing Association, et al., v. Smith, 26 Fed. (2nd Series), 1016,* wherein this patent and the infringing device described in the opinion of the District Court, in *Smith v. American Electric Rabbit Racing Association, et al., 21 Fed. (2nd Series), 366,* are referred to and the "conclusions" of the District Court were agreed to by the Fifth Circuit Court of Appeals in its decision. The main conclusion of the opinion in *Smith v. American Electric Rabbit, etc., et al., 21 Fed (2nd) 366,* so agreed to by the Fifth Circuit Court of Appeals, in *American Electric Rabbit, etc., et al., v. Smith, 26 Fed. (2nd), 1016,* is, that the substantial functions performed by the wheel and hinge are served by the rigid arm, in consequence of which equivalency obtains and infringement not avoided. In the decision of the Tenth

Circuit Court of Appeals that conclusion is to the contrary (R. p. 494).

In each case the validity of this patent is assumed by the parties and by the Courts, the conflict in each decision being as to the scope and infringement of the claims. The infringing device described in the Fifth Circut Court of Appeals decision and the infringing device described in this case are substantially identical, so that extrinsic evidence is not needed to apply in either of them to the patent specifications and claims, as from a mere comparison of the patented device and the infringing device in each case, the conflict of decision is manifest.

(2) As to Patent No. 1,507,440, the decision of the Tenth Circuit Court of Appeals denying infringement is in conflict with the decision of the Fifth Circuit Court of Appeals on the same matter. *(Rule 38, Sec. 5 [b]).* The conclusions of the opinion in *Smith v. American, etc., 21 Fed. (2nd), 266, supra,* incorporated in the decision of the Fifth Circuit Court of Appeals in *American Electric Rabbit Racing Association, etc., v. Smith, 26 Fed. (2nd), 1016, supra,* are substantially to the effect that defendants in that case have infringed, and the infringing housings described in each case are substantially identical as from a mere comparison with Claim No. 1 of the Patent and the infringing device described in both cases. Neither Court of Appeals held this patent invalid. *(Smith v. American, etc., 21 Fed. [2nd] 366, 372, et seq).* (R. pp. 495, 496). Its validity was assumed in the Fifth Circuit case, and the Tenth Circuit Court of Appeals predicates its decision of non-infringement on the scope of the claims and on the hypothesis of patentability. (R. p. 496).

(3) As to the discharge of the stipulated damage bond, the decision of the Tenth Circuit Court of Appeals on a suggestion confessedly without any evidence in the record to sustain it, that the bond is a subterfuge for the payment of illegal profits to be derived by respondents from the use of the infringing device, is a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision under Rule 38, Sec. 5 (b), of the Rules of this Court.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for Tenth Circuit, commanding that cou to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 112, *Magic City Kennel Club, Inc., and John J. Shaughnessy, Appellants, v. Hannah M. Smith, Administratrix of Estate of Owen P. Smith, Deceasel, Appellee*, and that the said decree and judgment of the United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will every pray.

HANNAH M. SMITH, ADMINISTRATRIX OF ESTATE OF OWEN P. SMITH, DECEASED.

By E. HOWARD M'CALEB,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. _____

HANNAH M. SMITH, Administratrix of Estate of Owen P. Smith, Deceased,

Petitioner,

versus

MAGIC CITY KENNEL CLUB, INC., and JOHN J. SHAUGHNESSY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

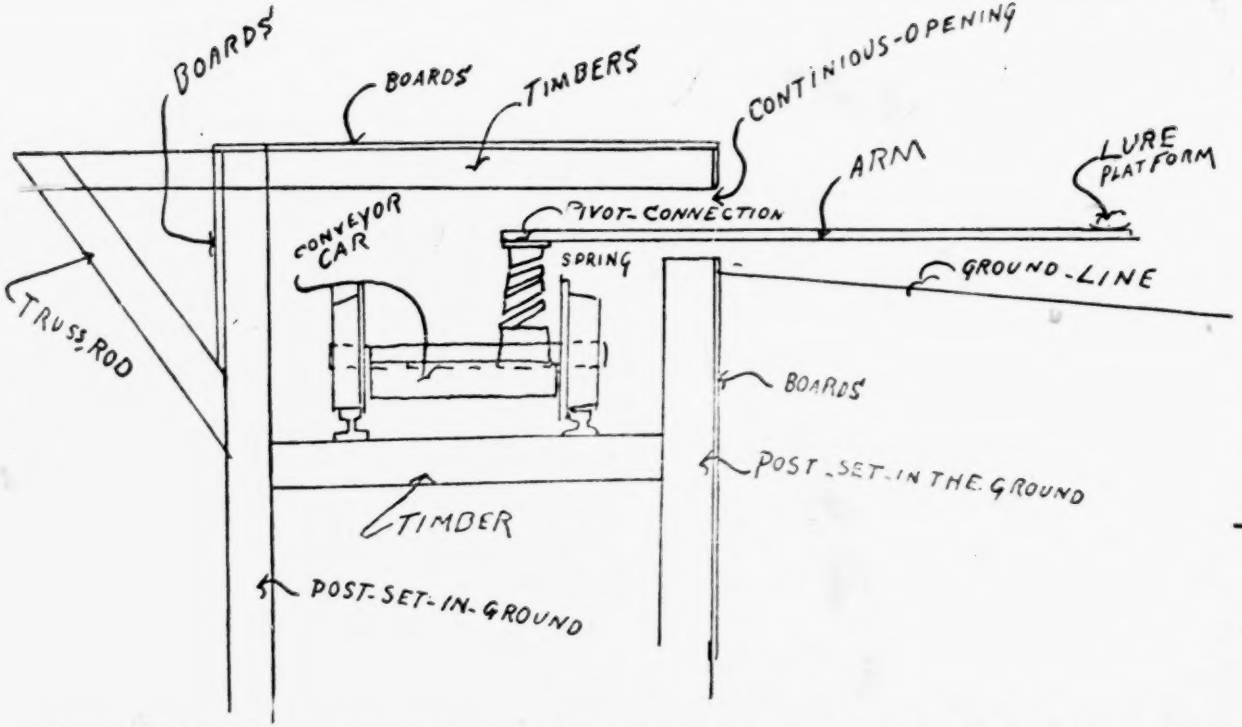
(a) No written opinion of the District Court, save the Master's report, R. p. 73, *et seq.)* confirmed by the decree (R. p. 106); (b) Opinion of U. S. Circuit Court of Appeals, Tenth Circuit in *Magic City Kennel Club and John J. Shaughnessy, Appellants, v. Hannah M. Smith, Administratrix, etc.*, No. 112 of the docket of said Court

is dated January 21st, 1930, not yet reported, and copied in R. pp. 490 to 499.

II.

Jurisdiction.

(a) Statutory provision believed to sustain the jurisdiction is Judicial Code Sec. 240 (a) as amended by Act. Cong. Feb. 13, 1925, Chap. 229, 43 Stat. 936; (b) date of decree sought to be reviewed is January 25, 1930 (R. p. 500), rehearing denied March 18th, 1930, (R. p. 515); date of filing petition for *certiorari*, see filing date stamped by Clerk of this Court on cover of petition for *certirorari;* (c) nature of case is an equity suit for infringement of Claims 1 and 2 of Patent No. 1,379,224, (R. pp. 2 to 13, R. p. 158), Claims 1, 2, 3 of Patent 1,507,440 (R. pp. 2 to 13; R. p. 169) and the validity of a $20,000.00 bond for stipulated damages given by respondents in lieu of a preliminary injunction (R. pp. 41, 43); (d) Rulings below: The District Court found and adjudged infringement of said claims, granted a permanent injunction and entered judgment for the amount of said bond in accordance with its terms (R. p. 106). On appeal therefrom, the Tenth Circuit Court of Appeals ruled that these claims were not infringed (R. pp. 490 to 499), dismissed the suit, dissolved the permanent injunction and discharged the bond (R. p. 500); (e) Cases believed to sustain the jurisdiction. *Mangum Import. Co. v. Coty 262 U. S. 159, 162, 163. Sanitary Ref. Co. v. Winters 280 U. S. p. 1, (74 L. Ed. Advance Opinions, U. S. Sup. Court Pamphlet No. 1, p. 1).*



Plaintiff's Exhibit No. 5. (R. p. 177)

(Note)—The words "posts set in ground, boards, timbers, truss rod and continuous opening" exhibit the construction of the casing or housing provided with a continuous opening; the words "pivot connection" exhibits rigid support of the horizontal-lure-carrying arm; the word "arm" exhibits the arm projecting from the conveyor and through the longitudinal opening of the casing over the ground line (track) and the words "lure platform" exhibits the platform of Claim 2.

Claim No. 1—In a dog racing amusement (1) a race course suited for dogs (2) a casing extending around the outer side of the race course and provided with a longitudinal opening (3) a mechanical conveyor including a track extending around the race course and located within the casing (4) and a conveyor car mechanically operated upon said track and provided with an arm extending through the longitudinal opening of the casing in a projecting position over the track and adapted to carry a lure (5) and a wheel rotably mounted on and supporting the arm at the p.ojecting end thereof.

Claim No. 2—In an amusement, the combination (1) a race course suited for dogs (2) a covered rail track adjacent said course on one side (3) a conveyor car mechanically operated upon said track (4) a horizontally extending arm hinged to said car extending midway of said course (5) a wheel rotably mounted near the end of said arm and resting upon the ground (6) a platform supported by said arm (7) and a lure or quarry mounted [illegible] for attracting the dogs

III.

Statement of the Case.

A statement of the case has been given under heading A of the petition for *certiorari* and in the interest of brevity need not be repeated.

For convenience, a cross-section view of respondents' apparatus is illustrated on the accompanying fly sheet (see opposite page) (See also R. p. 177; also R. pp. 158 to 165, claims 1 and 2, R. p. 165, lines 34 to 60; see also R. pp. 32, 33, 35, 36; Master's Report R. pp. 79, 80, 91; also R. pp. 110, 111, 112, 115, 116, 465, 467, 469). It substantially corresponds with the description of the infringing apparatus in *American Electric Rabbit, etc., v. Smith 26 Fed. (2nd), 1016*, and *Smith v. American Electric Rabbit, etc., 21 Fed. (2nd), 366*, (See also transcript of record same case, *sub. nom. Heintz and American Rabbit, etc., v. Smith, 278 U. S. 646*, No. 449, Oct. Term 1928, U. S. Supreme Court on petition for *certiorari* pp. 54, 80, 81, 82, 103, 143).

IV.

Specification of Errors.

The Tenth Circuit Court of Appeals erred in finding and holding:

(1) That Patent No. 1,379,224 Claims 1 and 2 are not infringed by respondents.

(2) That Patent No. 1,507,440 and either of the claims are not infringed by respondents.

(3) That the stipulated damage bond is void.

V.

Argument.

Summary of Argument.—(1) As to Patent No. 1,379,224, Claims 1 and 2. Considering that respondents' apparatus and the apparatus described in *American etc., v. Smith 26 Fed. (2nd), 1016)*, and *Smith v. American, etc., 21 Fed. (2nd), 366*, are substantially identical and in each apparatus the respondents in this case and the defendants in the Fifth Circuit Court of Appeals case substitute a rigid for the movable support of the arm described and claimed in the Patent, it is urged that:

Point A. The decision below is contrary to and in conflict with the prior decision of the Fifth Circuit Court of Appeals on the same matter.

(2) As to Patent No. 1,507,440, particularly Claim No. 1, considering that the invalidity of this patent was left undecided and its validity assumed in both cases and that respondents' housing is substantially identical with the housing described in the Fifth Circuit Court of Appeals case, it is urged that:

Point B. The decision below denying infringement is contrary to and in conflict with the prior decision of the Fifth Circuit Court of Appeals on the same matter.

(3) As to the discharge of the stipulated damage bond, considering that on a decree adjudging infringement the order and this bond given thereunder is limited to the payment of petitioner's damages only and not to respondents' profits, whether or not illegally derived by respondents, it results that

Point C. The decision of the Court below is a departure from the usual and accepted course of judicial proceedings.

Point A.

The decision below is contrary to and in conflict with the prior decision of the Fifth Circuit Court of Appeals on the same matter.

Conclusions of the Fifth Circuit Court of Appeals in *American Electric Rabbit, etc., v. Smith, 26 Fed. (2nd), 1016,* in agreement with *Smith v. American Electric Rabbit, etc., 21 Fed. (2nd), 366,* are as follows: (1) By this Patent, (No. 1,379,224) Smith, patentee, has substantially advanced the art entitling the patent and its claims to a liberal construction and to a range of equivalents commensurate with the scope of his invention *(Smith v. American Electric Robbit, etc. 21 Fed. (2nd), 366, at page 371);* (2) the essence of the invention described and claimed in Claims 1 and 2 is the horizontal-lure-carrying arm projecting over the race course through the longitudinal opening of the Conveyor housing *(Ibid, 21 Fed. (2nd) 366, at pages 368, 371, 372);* (3) the form of movable or wheel support of the hinge-mounted horizontal arm is not of the essence of the invention, that no limitation was imposed by the prior art and no disclaimer of equivalents therefor *(Ibid, 21 Fed. (2nd) 366, at pages 370, 371);* (4) that the arm rigidly connected to the conveyor car is the obvious equivalent of the hinged arm supported by a wheel, constituting a formal alteration and a deliberate evasion of the claims *(Ibid, 21 Fed. (2nd), 366, at pages 371, 372);* (5) defendants have thereby infringed.

Any one and more of these conclusions are controverted by the decision of the Court below, for the question decided in each case is whether the rigidly supported arm is the equivalent of the movably supported arm. Comparison between the structure described and claimed in the patent and the structure described in the Fifth Circuit Court of Appeals decision and in this case, evidences such an identity as to resolve the question in each case into one of law, the correct application of the rule of equivalency and which of the two decisions is correct. *Sanitary Refrigerating Co. v. Winters 280 U. S. (74 L. Ed. Advance Opinions U. S. Sup. Court Pamphlet No. 1, pp. 1, 4).*

Point B.

The decision below denying infringement of Patent 1,507,440 and the claims thereof, is contrary to and in conflict with the prior decision of the Fifth Circuit Court of Appeals on the same matter.

It is believed that the description of respondents' housing structure in the opinion below is incomplete and indefinite, so that, in the interest of clarity, reference should be made to the undisputed description of record (See R. pp. 177, 33, 35, 37, 83, 84, 110, 112, 117; also cross section view of housing on fly sheet, opposite page 11 of this brief). Enough is shown by the opinion that the member which the Court below designated as a "cleat" is the same member which the Fifth Circuit Court designates as a knee brace or truss rod, and the same member which the patentee designates in Claim No. 1 as a truss rod—At all events, these dissertations in nomenclature resulted in

the Fifth Circuit Court of Appeals in *26 Fed. (2nd)* in agreement with the conclusions of *21 Fed. (2nd), 366,* holding infringement and the Court below holding non-infringement. But aside from judging about similarities and differences by the names of things rather than by the office or function which they perform, and in view of the structure in each case reading directly on Claim No. 1, the conflict of decision is so manifest as to preclude further demonstration of the obvious. *Sanitary Ref. Co. v. Winters, 280 U. S. supra.*

Point C.

The decision below, as to discharge of the stipulated damage bond, is a departure from the usual and accepted course of judicial proceedings.

This point comes into play on a finding of infringement of any one of the claims as stipulated in the bond for petitioner's damages. Of course, on a dismissal of the bill for non-infringement, the remarks made in the opinion below become *dicta.* But on a finding of infringement, these remarks, confessedly without any evidence in support, relate to respondents' profits and not to the subject matter of the bond or to petitioner's damages, and therefore the discharge of the bond is arbitrary.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that a conflict of decision between the Fifth and Tenth Circuit Courts of Appeal on the same

matter may be removed, and that a departure from the usual and accepted course of judicial proceedings may be obviated, and that to such an end a writ of *certiorari* should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit and finally reverse it.

Respectfully submitted,

E. HOWARD M'CALEB,
Counsel for Petitioner.

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OCTOBER TERM, 1930.

No. 77

HANNAH [redacted] SMITH, Administratrix of ESTATE OF OWEN P. SMITH, Deceased,

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF ON BEHALF OF PETITIONER.

E. HOWARD M'CALEB,
Counsel for Petitioner.

MONTGOMERY-ANDREE PRINTING CO. INC., 430-432 CHARTRES, N. O.

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Summary of Argument:

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 77

HANNAH M. SMITH, Administratrix of ESTATE OF OWEN P. SMITH, Deceased,

Petitioner,

versus

MAGIC CITY KENNEL CLUB, INC., and JOHN J. SHAUGHNESSY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF ON BEHALF OF PETITIONER.

Opinions of the Courts Below.

(a) No written opinion of the District Court, save the Master's Report (R. p. 79 *et seq.*) confirmed by decree (R. p. 116); (b) Tenth Circuit Court of Appeals in *Magic City Kennel Club, Inc., et al., v. Smith*, 38 Fed. (2nd) 170, (also R. p. 405); (c) Fifth Circuit Court of Appeals in *American Electric Rabbit, etc., v. Smith*, 26 Fed. (2nd) 1016, agreeing with conclusions in *Smith v. American Electric Rabbit, etc.*, 21 Fed. (2nd) 366.